APPENDIX A

IN THE UNITED STATES COURT OF CLAIMS

No. 469-80L

TRAVELERS INDEMNITY CO.,

and

THE LIBERAL MARKET, INC.,

v.

THE UNITED STATES

O R D E R

(Filed March 30, 1982)

This case is before the court on cross motions for summary judgment, but the parties have stipulated the facts and wish us to decide on the basis of the stipulation. Both sides have filed briefs but waive oral argument. We may therefore dispose of the case without having to consider if there is any issue of relevant fact.

The suit is to recover the cost of cleaning up an oil spill and we have jurisdiction under 33 U.S.C. Section 1321. Liberal Market, Inc. (Liberal), is a wholesale meat distributor. Under a policy of insurance, Travelers has reimbursed the actual cost that Liberal incurred, $18,048.57. Defendant, by the Environmental Protection Agency, ordered the cleanup. The spill was of diesel fuel from two pumps and corresponding tanks on Liberal's premises, used to fuel Liberal's tractor trailers and others rented from Avis and used in Liberal's business. The oil flowed into Little Beaver Creek, a tributary of the Ohio River, which is part of the navigable waters of the United States.

Liberal had a chain link fence entirely around its premises, including a gate which was locked when the spill was caused. "Vandals" cut an opening in the fence in the brief period from 2 to 5 a.m. when no Liberal employees were on the premises. The vandals left the

two pumps delivering the diesel fuel on the ground. Liberal admits in the stipulation that a switch in the plant boiler room had to be in the "on" position to activate the two pumps and was left in that position during the closed hours when nobody employed by Liberal was on the plant premises, according to Liberal's usual practice. The plant was on formerly swampy ground, built up to receive the structure, but adjacent to the creek, into which any spill would naturally flow.

The statutory scheme is for absolute liability. However, if an owner or operator of an "onshore facility" from which oil has been "discharged" cleans it up according to regulation, he can recover against the United States in a suit in this court "upon establishing" that the spill was "caused solely by" an act or omission of a third party. 33 U.S.C. Section 1321 (i)(1). This language cannot be taken literally in that, of course, anyone who

placed oil on his premises could never show that the cause of a spill is "solely" the act of another, for obviously the act of placing the oil there contributed. To effectuate the obvious congressional intent to allow some mitigation of liability, the phrase "caused solely by" means that an owner or operator will be excused from liability in those situations which are complete beyond his control. In other words, responsibility for the spill must be entirely that of the third party, here the vandals. Unless the act or omission to perform a legal duty of an owner or operator is so indirect or insubstantial as not to constitute a contributing cause of the spill, he will be unable to shift responsibility wholly onto the vandals. In the present case, where plaintiff's failure to act has been called into question, it must show that it took adequate precautions to prevent and forestall the vandal's acts and, thereby, satisfied its legal duty to act. Proctor Whole-

sale Co. v. United States, 215 Ct.Cl. 1049, 1050 (1978).

If the stipulation fails to show that the precautions were all that was reasonably required, the claim must fail. We do not judicially know, and the stipulation does not tell us what precautions are normally expected of persons having on their premises pumps to feed petroleum products into the fuel tanks of business vehicles. Obviously, conditions being unfortunately what they are today, vandals must always be expected. The stipulation does not suggest any reason why they might not have been anticipated in the vicinity of Liberal's plant. The switch in the boiler room obviously provided the means for an added precaution Liberal failed to take. The stipulation does not tell us whether such switches are normal as parts of facilities to dispense gasoline and diesel fuel, whether if so it is a customary precaution to turn off the switch when the facility is not in use, or whether a

complete chain link fence circumscribing the facility, with a locked gate, is considered sufficient. With such a deficient stipulation the party having the burden of proof must lose. Without our meaning to intimate that any particular kind of evidence would suffice, there might for example be municipal ordinances, underwriter's rules, or other standards that would be at least suggestive; here we are neither told there were none, or if there was, what they were. Plaintiff puts a burden on our unaided perception of what is reasonable, that it simply is unable to bear. We do not even get to defendant's other contentions that plaintiff reasonably should have provided a dike or berm around the pump area.

Accordingly, defendant's motion for summary judgment is granted, plaintiff's motion for summary judgment is denied, and the petition is dismissed.

BY THE COURT
/s/ PHILIP NICHOLS, JR.
Judge

APPENDIX B

IN THE UNITED STATES COURT OF CLAIMS

No. 469-80

TRAVELERS INDEMNITY COMPANY,

and

THE LIBERAL MARKET, INC.,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

STIPULATION OF AGREED FACTS

Plaintiffs Travelers Indemnity Company and the Liberal Market, Inc. and defendant United States, by and through their undersigned counsel, hereby stipulate and agree as follows:

1. Plaintiff, Liberal Market, Inc. owns a meat distribution plant on Grange Hill Road, in Beaver Creek, Ohio. The meat distribution

plant consists of a large building and parking lot surrounded by a chain link fence approximately 8 to 10 ten high containing several gates. There are railroad tracks paralellel to the fence on the south side of the plant; another set of tracks dead ends at one of the front gates. There are some residences in the area. At the back of the meat distribution plant, there are two diesel fuel pumps inside the fence.

2. During the night of December 11 - 12, 1979, unknown vandals cut through the chain link fence surrounding Liberal's meat distribution center, disengaged the fuel nozzles from the diesel fuel pumps at the back of the plant, locked the fuels nozzles in the "on" position, thereby allowing diesel fuel to flow out of both nozzles. The gates in the fence had been locked, according to Liberal's standard procedure.

3. During the night of December 11 - 12,

pumps in the "on" position 24 hours per day.

12. Liberal purchased diesel fuel for one of the two tanks and used that fuel to fill its trailer refrigeration units.

13. Up to and including December 12, 1979, Avis Leasing Corporation leased trucks to Liberal for Liberal's meat deliveries.

14. Avis purchased diesel fuel for the second tank owned by Liberal and Avis used that fuel to fill the tractors it leased to Liberla.

15. Up to and including December 12, 1979, no one, other than Liberal's employees, possessed keys to the locks on the gates and doors at the meat distribution center.

16. Although Avis was responsible for purchasing fuel and filling its leased trucks, Liberal was responsible for securing the diesel fuel pumps.

17. From at least 1974 up to and including December 12, 1979, it was normal practice for Liberal to leave the pump used by Avis un-

United States in the instant action.

7. The two diesel fuel pumps from which the discharge occurred are connected to two underground fuel tanks. The pumps and tanks are owned by plaintiff Liberal Market, Inc. and are within the confines of Liberal's property at the Liberal Meat Distribution Center on Grange Hill Road, Beaver Creek, Ohio.

8. These fuel pumps and tanks constitute an "onshore facility" within the meaning of 33 U.S.C. Section 1321(a)(10).

9. Liberal Market, Inc. is the "owner or operator" of the above described onshore facility. 33 U.S.C. Section 1321(a)(6).

10. The fuel pumps are activated by an electrical switch located in the boiler room of the meat processing building at the Liberal meat distribution center.

11. Up to and including December 12, 1979, it was Liberal's normal procedure to leave the electrical switch activating the fuel

1979, approximately 7,000 gallons of diesel fuel ran out of the two pumps and into Little Beaver Creek.

4. Little Beaver Creek flows into Beaver Creek which flows into the Little Miami River, which is a navigable water of the United States, and is a tributary of the Ohio River.

5. Liberal Market, Inc. employed O.H. Material's Company, Liquid Waste, Inc. and Jack L. Woody Excavating to perform services to clean up the spilled oil. Liberal incurred cost in the amount of 18,048.52 in cleaning up the spilled oil. The clean-up operation was substantially completed within three days.

6. Plaintiff Travelers Indemnity Company was Liberal's insurer and paid Liberal the sum of 18,048.52 to cover the cost of clean-up. Liberal gave to Travelers a loan receipt which obligates Liberal to reimburse Travelers for the sum of the loan in the event that Liberal were to recover any money from the

locked.

18. It was Liberal's normal practice that the first person on the day shift would arrive at the plant at approximately 5:00 a.m. and the last person on the night shift would leave the plant at approximately 2:00 a.m.

19. Although there are lights located at the back of the meat processing plant, these lights were not normally left on overnight and were not on the night of December 11 - 12, 1979. There normally were lights on in the parking lot at the front of the plant.

20. Liberal did not employ security guards at its meat distribution center up to and including December 12, 1979.

21. Although Liberal had install an alarm system at the meat distribution center, it was connected to the building only and was not designed to be activated by a person's tampering with the fence.

22. The property upon which the meat dis-

tribution center is located was originally a marshy low-lying area. Liberal raised the elevation of its property by approximately four feet in order to build its facility.

23. Liberal's pumps are located at the back of its property approximately five feet from the fence.

24. The property declines sharply just outside the fence at the back of the property. This decline allowed the oil spilled on December 12, 1979 to enter the navigable waters of the United States.

25. Liberal has never had an oil containment system at its meat distribution cneter; nor are there dikes or berms surrounding its property or the area in which the pumps are located.

Dated is 28th day of August, 1981.

/s/ NANCY J. MARVEL
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